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1 P R O C E E D I N G S

2 (11:20 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 next in Case 14-185, Mata v. Lynch.

5 Mr. Fleming.

6 ORAL ARGUMENT OF MARK C. FLEMING

7 ON BEHALF OF THE PETITIONER

8 MR. FLEMING: Mr. Chief Justice, and may it  
9 please the Court:

10 The Court has been offered two ways to  
11 approach this case, a short way and a long way. We  
12 believe we prevail under both and I will address both,  
13 but I would start with the short way, which we think is  
14 the right way. This is a case about appellate  
15 jurisdiction --

16 JUSTICE KENNEDY: You know the way to our  
17 hearts.

18 (Laughter.)

19 MR. FLEMING: I try to please, Justice  
20 Kennedy.

21 This is a case about appellate jurisdiction  
22 and specifically whether Congress has given the courts  
23 of appeals jurisdiction to review the denial of a motion  
24 to reopen that would be timely through the application  
25 of equitable tolling. And that question is answered by

1 Section 1252 of the INA, which creates jurisdiction over  
2 denials of motion to reopen as the Court confirmed in  
3 Kucana and it makes no distinction based on the grounds  
4 of the denial of the motion to reopen.

5 In this case the board denied Mr. Mata's  
6 motion as untimely, it ruled that equitable tolling was  
7 generally available, but that Mr. Mata was not entitled  
8 to it because it erroneously believed that his  
9 misdemeanor assault conviction qualified as a crime  
10 involving moral turpitude. That legal error was  
11 reviewable. It would have been reviewed in any other  
12 circuit. It should have been reviewed here and the  
13 government agrees, and Mr. Peterson as amicus, does not  
14 mount any argument that that denial somehow does not  
15 fall within the jurisdictional grant of Section 1252.

16 JUSTICE GINSBURG: Can you explain why -- on  
17 the surface, he beats up his girlfriend. But why that  
18 is not a crime involving moral turpitude? Because I had  
19 thought that the -- the rest of this is academic if the  
20 bottom line is he's committed a crime of moral  
21 turpitude?

22 MR. FLEMING: Justice Ginsburg, first of  
23 all, that -- that is a question that the First Circuit  
24 did not reach and we submit should have reached. But to  
25 answer the question, the BIA has a very developed

1 jurisprudence regarding when assault crimes qualify as  
2 crimes involving moral turpitude and it involves  
3 consideration of a number of factors.

4 It involves not only the level of injury  
5 that was either intended or caused, but also the level  
6 of intent. And as the level of intent that is  
7 chargeable under the offense decreases from  
8 intentionality to, say, recklessness, then the level of  
9 bodily injury that is required has to concomitantly  
10 increase in order for it to constitute moral turpitude.

11 In Texas, the simple assault statute that  
12 Mr. Mata pled guilty under is not an aggravated assault  
13 statute. It can be charged based only on bodily injury  
14 and that is defined in a purposely broad way, as the  
15 Texas court of appeals has stated, to include even  
16 injury caused by relatively minor physical contact.

17 So simple assault that can be charged under  
18 that provision is not turpitudeness and that's what the  
19 Board should have ruled and that was the argument that  
20 was presented to the Fifth Circuit, but the Fifth  
21 Circuit determined that it did not have jurisdiction to  
22 decide. That is the issue we've asked this Court to  
23 review. Of course, it does not need to go into the  
24 turpitudeness or not quality of the offense under  
25 Section 2201(a)(1) of the Texas Penal Code.

1           Because this is a jurisdictional question,  
2   there is no need to go further to the issues that Mr.  
3   Peterson is raising regarding whether there is equitable  
4   tolling as a matter of merits under the INA. We don't  
5   think it's necessary. We think the Fifth Circuit can  
6   address that if appropriate, if it chooses to on remand.

7           JUSTICE GINSBURG:           What if --

8           JUSTICE SCALIA:           Well, wait --

9           JUSTICE GINSBURG:           Wouldn't the Fifth  
10   Circuit need to be -- I mean, the Fifth Circuit view was  
11   no equitable tolling, period. The statute says 90 days.  
12   It has a couple of exceptions and that's it. So if we  
13   simply say you have jurisdiction, the -- the answer  
14   would likely be fine, you told us we have jurisdiction.  
15   We think this limitation period has no give, end of  
16   case.

17          MR. FLEMING:           Justice Ginsburg, we don't  
18   think that's what the Fifth Circuit did in this case or  
19   in any other. In this case, the Court specifically  
20   disavowed any ruling on the merits of the equitable  
21   tolling claim. It simply dismissed the petition for  
22   lack of jurisdiction. Notably, the BIA in 2012 in a  
23   case called Chavez-Guzman, which we cite in our reply,  
24   recognized that the Fifth Circuit has not addressed in a  
25   published decision whether the motion time limitations

1 may be equitably tolled in cases claiming  
2 ineffectiveness of counsel.

3 JUSTICE SCALIA: Why did -- why did the  
4 Fifth Circuit treat this, therefore, as a -- as it  
5 requested review the sua sponte extension granted below?

6 MR. FLEMING: It's --

7 JUSTICE SCALIA: Why -- why would it have  
8 done that if it -- if it thought that, in fact, there  
9 was some argument about whether -- whether they could  
10 appeal the denial of extension in law as opposed to in  
11 the sua sponte discretion of the agency?

12 MR. FLEMING: It's -- there are two stages  
13 to the answer, Justice Scalia. And it's regrettable  
14 that the decisions that issue from the Fifth Circuit do  
15 not -- they have conclusory statements in them and not a  
16 lot of reasoning.

17 First of all, you have the unpublished  
18 decisions which say that the circuit will construe a  
19 request for equitable tolling as a request for sua  
20 sponte reopening.

21 JUSTICE SCALIA: Why? Why would one do  
22 that?

23 MR. FLEMING: So my best reading of them --  
24 and again, the reasoning is sparse. They say that in  
25 their view, equitable tolling is not a basis for filing

1 a motion after 90 days. Now, because they have not --

2 JUSTICE SCALIA: Which means there --  
3 there's no equitable tolling.

4 MR. FLEMING: I -- I -- now, that's not  
5 something that they've ever adopted in a published  
6 decision. I think one reading of that -- and this is  
7 the reading the government, I think, endorses or at the  
8 very least there's a dispute about it -- is that the  
9 Fifth Circuit was saying the statute and the regulations  
10 on their terms do not use the words "equitable tolling."  
11 That, of course, does not resolve the fundamental  
12 question whether as a matter of statutory  
13 interpretation --

14 JUSTICE SCALIA: Sure.

15 MR. FLEMING: -- or as a matter of  
16 administrative authority equitable tolling can be  
17 applied.

18 But I -- I want to be clear, we -- we do not  
19 fear this question at all. And if the Court wishes to  
20 reach the merits issues that Mr. Peterson has put before  
21 the Court, we are happy to fight on that ground. We  
22 simply want it to be plain that we didn't present the --  
23 the jurisdictional question as including a merits  
24 question. If the Court thinks it needs to be decided,  
25 then the Court has the briefing and I'm prepared to talk

1 about it.

2 JUSTICE SCALIA: Do you acknowledge that  
3 if -- if you view this as the Fifth Circuit viewed it,  
4 as a request to review the sua sponte extension granted  
5 by the agency, that the Fifth Circuit would have had no  
6 jurisdiction over that?

7 MR. FLEMING: We do not, Justice Scalia.  
8 And I just want to be clear the context in which I  
9 answer that question. That requires a lot of steps  
10 before the Court even gets to that. First of all, it  
11 not only requires getting to the merits issues, it  
12 requires rejecting our primary -- our contention on the  
13 merits, which is that as a matter of statutory  
14 interpretation, this is tollable. It requires rejecting  
15 the government's position that at the very least, the  
16 statute does not prohibit the board from implementing  
17 the 90-day time limit by using equitable tolling. And  
18 if you get to that point such that you're in a  
19 through-the-looking-glass world where the board was, in  
20 fact, not doing what it thought it was doing, namely,  
21 exercising authority under the statute, but instead,  
22 exercising regulatory sua sponte authority, then you get  
23 to the question, are there judicially manageable  
24 standards to review what the board, in fact, did in this  
25 case?

1           And there clearly are.           They have -- they're  
2   being reviewed in every other circuit when there is a  
3   request for equitable tolling based on ineffective  
4   assistance of counsel. The equitable tolling standards  
5   are well settled under this Court's decision in Pace v.  
6   DiGuglielmo. The ineffective assistance standards are  
7   well settled by the board's own Lozada decision.

8           Now, it may well be that there are other  
9   situations where the board simply says request denied  
10   and that may be a situation where jurisdiction would be  
11   in doubt. But if you are talking about a case like this  
12   one where the board writes an opinion that says, here  
13   are the standards we are applying and we believe that  
14   the Petitioner is ineligible for equitable tolling  
15   because his conviction is for a crime involving moral  
16   turpitude, that is a legal question that is reviewable,  
17   regardless of how you caption the authority under which  
18   the board is acting.

19           JUSTICE SOTOMAYOR:           Now, I've -- I've  
20   forgotten, but is there a circuit split on that third --  
21   on the sua sponte review?

22           MR. FLEMING:           There is no circuit split as  
23   such because every other circuit believes, as we think  
24   is correct, that this kind of decision is reviewable as  
25   a matter of statutory authority. And that's what the

1 board is doing. That's what the board itself thinks  
2 it's doing. So every other circuit to have decided the  
3 issue does say it has jurisdiction to review this kind  
4 of decision. They don't call it sua sponte.

5 JUSTICE GINSBURG: How do we make it clear  
6 to the Fifth Circuit? We say Fifth Circuit, you have  
7 jurisdiction. They say fine. We said before and we say  
8 again that this statute is not susceptible to equitable  
9 tolling and then we're right back where we are.

10 MR. FLEMING: If that is, in fact, what the  
11 Fifth Circuit does, then it may well be, because then  
12 there would be a clear circuit split on the merits  
13 question of the availability of equitable tolling. I  
14 would hold out hope that the Fifth Circuit would not  
15 create that circuit split; that when disabused of the  
16 belief that it lacks jurisdiction, it would then engage  
17 in the analysis that we and the government believe it  
18 should engage in and find that like every other circuit  
19 to have addressed the issue, there is, in fact,  
20 equitable tolling available and would address Mr. Mata's  
21 request for it on the merits.

22 JUSTICE GINSBURG: Well, it knew at the time  
23 it rendered its decision that the other circuits were  
24 taking a different position on whether the 90-day period  
25 was susceptible to extension.

1           MR. FLEMING:           It did, Your Honor. The panel  
2 felt -- felt itself bound by prior precedent on the  
3 jurisdictional question. This is why I don't think  
4 fundamentally that it reached a decision in this case or  
5 in any published opinion on the merits of that.

6           JUSTICE SCALIA:        I'm not sure -- did the  
7 First Circuit say it has no jurisdiction to review  
8 the -- the statutory question?

9           MR. FLEMING:           The --

10          JUSTICE SCALIA:        I thought all it did was,  
11 since there is no tolling under the statute, we're going  
12 to interpret this as a sua sponte thing, and the only  
13 question before them is whether that sua sponte thing  
14 conferred jurisdiction or not. Isn't that what  
15 happened?

16          MR. FLEMING:           It -- I -- I don't think so,  
17 Justice Scalia.

18          JUSTICE SCALIA:        Okay.

19          MR. FLEMING:           I think if that had happened,  
20 if that was really what the Fifth Circuit meant to do,  
21 then it should have assumed jurisdiction over our  
22 request for statutory tolling. It should have denied  
23 the petition to that extent, and then it could have  
24 dismissed the request for sua sponte reopening. But it  
25 didn't do that. It dismissed the entire thing for lack

1 of jurisdiction, which is why we think there is no  
2 merits ruling here that the Court needs to reach.

3 Again, however, I say that if the Court  
4 wishes to reach it, we believe the answer is clear and  
5 correct under this Court's precedence that the 90-day  
6 time limit is a statute of limitations, and that it  
7 should be -- there is no reason to think that the  
8 presumption of tolling either doesn't apply or has been  
9 rebutted.

10 CHIEF JUSTICE ROBERTS: Where -- where is  
11 Mr. Mata at this point?

12 MR. FLEMING: He's -- he's at home with his  
13 family. His -- his order has been --

14 CHIEF JUSTICE ROBERTS: So you don't mind if  
15 this goes back to the Fifth Circuit.

16 MR. FLEMING: This should go back to the  
17 Fifth Circuit, and the question is simply that Mr.  
18 Peterson has raised is, what does it go back with? Does  
19 it go back solely with directions that the court has  
20 jurisdiction and everything should be addressed by  
21 the -- the Fifth Circuit in the first instance, or does  
22 it go back with a decision that, in addition to there  
23 being jurisdiction, there is also equitable tolling, and  
24 then the Fifth Circuit can address the question on the  
25 merits.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 MR. FLEMING: With the Court's permission,  
3 I'll reserve the balance of my time. Thank you.

4 CHIEF JUSTICE ROBERTS: Mr. Yang.

5 ORAL ARGUMENT OF ANTHONY A. YANG

6 ON BEHALF OF THE RESPONDENT

7 IN SUPPORT OF REVERSAL AND REMAND

8 MR. YANG: Mr. Chief Justice, and may it  
9 please the Court:

10 The court of appeals here rested its  
11 decision on a basic and fundamental error of  
12 administrative law. Rather than review the board's  
13 decision on its own terms, the court of appeals  
14 recharacterized the question before it into a different  
15 question over which it lacked jurisdiction. That course  
16 is inconsistent with the Chenery rule, which, since even  
17 before the APA, required that judicial review of agency  
18 action be based on the rationale adopted by the agency.

19 JUSTICE SCALIA: But the way you put it  
20 causes me to believe that you agreed that the Fifth  
21 Circuit would have had no jurisdiction.

22 MR. YANG: We --

23 JUSTICE SCALIA: If indeed it was the sua  
24 sponte action that they were reviewing.

25 MR. YANG: That's right. We disagree with

1     Petitioner on this point --

2             JUSTICE SCALIA:             On that point.

3             MR. YANG:             But we don't think it affects the  
4     disposition here. Also I would note that every single  
5     court of appeals with jurisdiction over immigration  
6     cases agrees with our position. There is no circuit  
7     split because it's unanimous in our favor.

8             JUSTICE KAGAN:             And Mr. Yang, could you  
9     point me to the place in the board's decision that you  
10    think makes clear what the board was doing? Because as  
11    I looked at the board's decision, honestly, I found it a  
12    little bit difficult to tell whether the board was  
13    denying it on statutory grounds or on sua sponte  
14    grounds.

15            MR. YANG:             I agree with you that the board's  
16    decision could be a little bit more clear. Some  
17    background is helpful.

18            This is a question of equitable tolling for  
19    ineffective assistance of counsel. That's the claim.  
20    And so that claim embodies at least four requirements.  
21    One, you have to have normal equitable tolling  
22    satisfied.

23            You have to also show ineffective  
24    assistance, and that has subparts, including prejudice  
25    from the ineffective assistance, and you have to show

1     that you've met the requirements of the Lozada decision,  
2     which has certain procedural showings that have to be  
3     made.

4             Now, in order to get to equitable tolling,  
5     you therefore have to show prejudice. And if you look  
6     at Petition Appendix 7, after talking about Lozada in  
7     the first full paragraph, in the second paragraph, they  
8     say, you know, in Lozada, although the resulting  
9     summary -- there was a summary dismissal of appeal, did  
10    not amount to a deprivation of due process and was not  
11    prejudicial.

12            And then with respect to prejudice, they  
13    explain on two bases, the decision here, or the alleged  
14    ineffective assistance was not prejudicial, one, because  
15    it was not a crime of -- there was a crime of moral  
16    turpitude which precluded relief; and, two, the alien  
17    failed to submit at the motion to reopen stage, evidence  
18    showing that there was exceptional and extremely unusual  
19    hardship.

20            All of that goes to prejudice, which goes to  
21    the tolling question. And the predicate, of course, was  
22    the statement earlier that the time for filing a motion  
23    to reopen may be tolled in cases of ineffective  
24    assistance of counsel, but then they were just focusing  
25    on the second.

1           So the way that we read the board, which I  
2   think is the way the board has decided these cases  
3   generally is that the questions of ineffective  
4   assistance and equitable tolling here are kind of mixed.  
5   And the board's decision addressed the -- the prejudice  
6   prong of that -- those requirements.

7           JUSTICE BREYER:           I somehow have the  
8   impression, I don't know, the AG is going to have some  
9   kind of rulemaking relevant to this.

10          MR. YANG:           There is pending rulemaking, as  
11   we noted in our brief. There is a notice of proposed  
12   rulemaking that the Department has submitted to OMD that  
13   is expected to, you know, hopefully go forward.

14          JUSTICE BREYER:           Rulemaking has to do with  
15   the existence or nonexistence of equitable tolling under  
16   this provision?

17          MR. YANG:           The rulemaking, of course, is not  
18   public, but what I can tell you --

19          JUSTICE BREYER:           Yes.

20          MR. YANG:           -- is that the -- in the Compean  
21   decision, the Attorney General addressed generally  
22   questions of ineffective assistance of counsel. One of  
23   the components of that was equitable tolling of the  
24   deadline for ineffective assistance. It would be  
25   logical to assume that because the -- that Compean

1 ruling was vacated in favor of the rulemaking, the  
2 rulemaking scope could be similar to the Attorney  
3 General's decision.

4 JUSTICE KAGAN: So on that assumption, that  
5 would, as I understand it, give the Fifth Circuit  
6 something new to think about in -- in addressing this  
7 question; is that right?

8 MR. YANG: It certainly would, and it would  
9 also have the benefit, on remand, of the government's  
10 clear view that there is equitable tolling here,  
11 although not applicable to this alien, but just  
12 generally equitable tolling is available as all the  
13 courts of appeals have decided. And as we note in our  
14 brief, we don't think the Fifth Circuit is precluded  
15 even at the panel level from reaching that decision.

16 JUSTICE GINSBURG: Would the -- would the  
17 Fifth Circuit, with this rulemaking, you can't tell us  
18 what it is at this stage, this early stage, would it be  
19 available, will they have a rule should we remand this  
20 case to the Fifth Circuit?

21 MR. YANG: I think it's unlikely there's  
22 going to be a final rule by the time this Court's  
23 decision is issued. The unified agenda projects a  
24 notice of proposed rulemaking being issued late this  
25 year. And then the notice and comment period would have

1 to elapse, and we'd have to get to a final rule. So I  
2 don't think by the time June rolls around, we'll get the  
3 final rule.

4 JUSTICE KAGAN: I'm -- I'm sorry, but there  
5 would be an NPR when? Late this calendar year?

6 MR. YANG: Late this calendar year. That's  
7 what the unified agenda projects.

8 So -- but again, I don't think sending this  
9 case back on the very basic point that the Fifth Circuit  
10 can't sidestep its obligation to review a motion to  
11 reopen by characterizing it as something that it's not,  
12 would wipe the slate clean. The Fifth Circuit in its  
13 first -- in an earlier unpublished decision, in fact,  
14 found that there was equitable tolling and reversed the  
15 board to apply equitable tolling. Only later did it  
16 change course without any reasoning and assert, again  
17 with zero reasoning, that there was not equitable  
18 tolling, and then adopted this construal rule.

19 But the construal rule itself is just  
20 fundamentally into the teeth of the Chenery doctrine.  
21 And had the court of appeals recognized that what it had  
22 to review was the denial of the alien's motion to  
23 reopen, it would have had jurisdiction. And it doesn't  
24 matter, you know, amicus has tried to -- I think  
25 artfully tried to recharacterize this jurisdictional

1 question into a question of the merits, but the answer  
2 to the merits doesn't affect the jurisdiction.

3 If you were to assume, as the amicus has  
4 argued, that there is no equitable tolling in this  
5 context because the statute precludes it, that would not  
6 be a jurisdictional problem. What it would mean is that  
7 the court of appeals would simply affirm the board on  
8 the merits; that is affirm the board's denial of a  
9 motion to reopen, because there can be no equitable  
10 tolling.

11 Again, we come back to the -- this case is a  
12 very simple case. It's an appropriate case to end the  
13 term on; it's quick, it's easy. The court of appeals  
14 should have simply done what courts of appeals do all  
15 the time when they're conducting agency review, a review  
16 of agency action; that is, review the action before it  
17 and not recharacterize it into something that it's not.

18 CHIEF JUSTICE ROBERTS: Well, to be fair to  
19 the Fifth Circuit, I mean, I can't put myself in their  
20 mind, but I think they may well have been trying to give  
21 Mr. Mata the benefit of the doubt or give him every  
22 chance. I mean, they say it's equitable tolling but,  
23 you know, you're not going to get equitable tolling, so  
24 that's no relief. And since you can't get it, maybe  
25 you're trying to get something else. And so we'll look

1 at whether you get something else, and then too bad, it  
2 turns out you don't get that either.

3 MR. YANG: Well, I won't speculate what  
4 to -- what the court of appeals' motivations might have  
5 been for its ruling, but the ruling itself is again just  
6 fundamentally into the teeth of Chenery. It's true that  
7 when the courts are addressing a pleading that's filed  
8 before the court, itself, the court can say, well, I'm  
9 going to read this generously. They do this in certain  
10 contexts.

11 But when you're conducting review of agency  
12 action, the rule that has always existed in the modern  
13 APA era has been you look to what the agency has done.  
14 And when you look to what the agency has done here, it  
15 addressed and rejected the alien's motion to reopen.

16 JUSTICE KAGAN: Just to try to be a little  
17 bit generous to the Fifth Circuit, again, I mean, I  
18 started off by saying, I found it a little bit hard to  
19 tell what the agency was doing. And you presented a  
20 very good explanation, but it's an explanation that  
21 actually requires some background knowledge, and I'm not  
22 sure that they would have gotten that from just looking  
23 at the face of the thing.

24 MR. YANG: And I don't mean to -- to fault  
25 the Fifth Circuit.

1 JUSTICE KAGAN: But, I mean, you can't  
2 really -- Chenery can't really operate very well if you  
3 can't figure it out.

4 MR. YANG: Well, that's true. But the --  
5 that is true, but the answer then is always to remand.  
6 If you can't discern what the -- the course of the  
7 agency's decision is, the other established rule is you  
8 remand. And, you know, the -- this is not an unfamiliar  
9 question to the courts. Generally, if you can discern,  
10 even if it's in a cryptic way, what -- what the -- the  
11 alien's -- excuse me -- the agency's path in an agency  
12 decision, you review that. If you --

13 JUSTICE GINSBURG: Is it true that the --  
14 the -- the agency, the BIA, has, a number of times,  
15 recognized the existence of equitable tolling of this  
16 90-day period, but has never done so in a  
17 precedential opinion?

18 MR. YANG: That -- that is correct. That is  
19 correct. It -- there is no precedential opinion. There  
20 was, of course, the Attorney General's opinion in  
21 Compean, which addressed both the standards for  
22 ineffective assistance claims, as well as the  
23 application of equitable tolling for cases involving  
24 ineffective assistance. So the AG made that ruling, and  
25 it's a way that's consistent with, I think, the -- what

1 we've articulated in the brief. That was vacated in  
2 lieu of what -- what we will now have, which is a  
3 rulemaking process to address the questions. So there  
4 is no precedent, although the Attorney General has  
5 briefly spoken on the issue.

6 If there's no further questions, I'm going  
7 to --

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 MR. YANG: Thank you.

10 CHIEF JUSTICE ROBERTS: Mr. Peterson.

11 ORAL ARGUMENT OF WILLIAM R. PETERSON

12 ON BEHALF OF THE COURT-APPOINTED AMICUS CURIAE,

13 SUPPORTING THE JUDGMENT BELOW

14 MR. PETERSON: Mr. Chief Justice, and may it  
15 please the Court:

16 We agree with the government that orders  
17 denying statutory motions to reopen are reviewable in  
18 the courts of appeals, and we agree with the government  
19 that orders of the board denying invitations for the  
20 board to reopen sua sponte are not reviewable in the  
21 courts of appeals because they're committed to agency  
22 discretion by law.

23 Where we part ways with the government is on  
24 how you distinguish between the two of them. And we  
25 offer what we think is the easiest test, which is the

1     timeliness. If an alien asks the board to reopen within  
2     the statutory deadline, within the 90 days, he has a  
3     right to reopening that is reviewable under Kucana if  
4     the board denies it.

5             On the other hand, if the alien requests  
6     reopening after the expiration of the 90-day statutory  
7     period, the board is not obligated to grant reopening in  
8     those circumstances. The board could grant reopening  
9     only through its exercise of sua sponte authority, and  
10    as a result, that decision is wholly in the board's  
11    discretion.

12            Now, the government turns to Chenery to  
13    suggest a rule that courts must always characterize  
14    agency decisions in precisely the way the agencies did.  
15    This Court, we think, rejected that argument in  
16    Brotherhood of Locomotive Engineers where it explained  
17    that Chenery has nothing whatever to do with whether  
18    agency action is reviewable. So we see Brotherhood as a  
19    remarkably analogous case. There the request being made  
20    of the commission was to reconsider a previous decision,  
21    and the court distinguished between two types of ways  
22    that a party could ask the commission to change one of  
23    its earlier decisions.

24            It could file a motion for reconsideration,  
25    simply suggesting that the law was wrong, the earlier

1 decision was simply incorrect on the same record. The  
2 court held that that is not reviewable. Or the party  
3 could file a motion to reopen with new evidence  
4 attached, which would be reviewable. And what the court  
5 said was that in determining whether the court of  
6 appeals had jurisdiction over the petition for review,  
7 it didn't need to focus on how the agency characterized  
8 its order. It could focus on whether that order was  
9 reviewable.

10 So in this case, Petitioner acknowledges  
11 that if equitable tolling is unavailable, his motion to  
12 reopen was untimely. If he filed 115 days, his only  
13 argument in favor of timeliness is equitable tolling.

14 JUSTICE SOTOMAYOR: Well, I'm -- I'm a  
15 little concerned because we do have to, on some levels,  
16 address the question of whether a sua -- sua sponte  
17 decision not to -- not to reopen is -- is reviewable.  
18 I -- I think as a general matter, one could say that  
19 given the vast discretion that the BIA gets in denying,  
20 that one should basically defer to their decisions in  
21 sua sponte reopenings. But occasionally, they do it not  
22 as an exercise of discretion, but as an erroneous  
23 interpretation of law. And there's plenty of standards  
24 to correcting that. And so even for me, in sua sponte  
25 openings -- and I do understand I'm probably on a losing

1 slope -- and I think that's what the -- the board is  
 2 basically saying. It's a matter of -- of deciding  
 3 whether there was ineffective assistance of counsel, and  
 4 we have a right and this is the standard we're going to  
 5 set. Lozada sets the standard that we're going to look  
 6 at, and for that reason, there is equitable tolling.  
 7 That's basically all they're saying, in my judgment.

8 MR. PETERSON: Your Honor, we disagree that  
 9 Lozada sets the standard for ineffective assistance of  
 10 counsel. We believe that Lozada sets the standard for  
 11 how an ineffective assistance of counsel claim must be  
 12 raised.

13 JUSTICE SOTOMAYOR: You're right. How it --  
 14 but here, they basically said it -- you didn't have due  
 15 diligence, I believe, and so you failed the  
 16 prerequisites.

17 MR. PETERSON: Your Honor, we would disagree  
 18 that in this case, the board actually construed  
 19 Petitioner as asking for equitable tolling. And there's  
 20 a reason for that, which is that Petitioner did not ask  
 21 for equitable tolling before the Board of Immigration  
 22 Appeals. His initial motion to reopen does not  
 23 acknowledge its untimeliness. It says nothing about  
 24 untimeliness at all. He mentions, in his reply in  
 25 support of the motion to reopen, that it is not

1     untimely if there are exceptional circumstances. You  
2     will not find the phrase "equitable tolling" in any of  
3     the papers the Petitioner filed with the Board of  
4     Immigration --

5             JUSTICE GINSBURG:             Well, who was he --

6             MR. PETERSON:             -- Appeals.

7             JUSTICE GINSBURG:             -- represented by at that  
8     stage? I mean, is -- this is a case involving  
9     ineffective assistance of counsel when he brought the --  
10    at -- at what stage was there competent counsel?

11            MR. PETERSON:            Justice Ginsburg, my  
12    understanding is the Petitioner's current theory is that  
13    he was represented by competent counsel when he retained  
14    new counsel after the board's initial denial of his  
15    appeal. That was October 10th, 19 days after the  
16    board's decision. You'll see --

17            JUSTICE BREYER:            What we have here is a  
18    question that we agreed to review. The question is  
19    whether the Fifth Circuit Court of Appeals erred in this  
20    case in holding it has no jurisdiction to review  
21    Petitioner's request that the board equitably tolled the  
22    90-day deadline on his motion to reopen as a result of  
23    ineffective assistance of counsel. We granted review on  
24    that.

25            As far as what the Fifth Circuit said, among

1 other things it says, it lacks jurisdiction to review  
2 the BIA's denial of Mata's untimely motion to reopen,  
3 and so it need not address the merits. Now, it said  
4 other things, too, which tend to support you as going on  
5 this other ground, but it did say that. And you read,  
6 at least somewhat possibly, you could say he did ask the  
7 board to equitably toll his motion. And the board said,  
8 no, we won't equitably do that because it's not going to  
9 make any difference, basically. You weren't really  
10 prejudiced.

11           Okay.           Given all that, why should we decide  
12 a different question? Why don't we decide the question  
13 that we said we would decide? And if we're going to  
14 decide the question we said we'd decide, I would think  
15 the answer is pretty clear. They did have jurisdiction  
16 to review it. They can review it and say the board was  
17 right because they have a lot of discretion here,  
18 et cetera, or for whatever reason, because there is no  
19 equitable tolling, whatever they want to say. I  
20 wouldn't guess that.

21           But I've never heard of any precedent that  
22 would -- I can't think of one that would suggest that  
23 when an agency does something like this, requests  
24 equitably to toll, denied, appeal, that a court of  
25 appeals wouldn't consider whether they're right or

1 wrong. I mean, what -- what -- if we get to that  
2 question, is there any case? No, because I thought  
3 normally, courts of appeals do review that kind of  
4 question. You may have a weak argument, but then  
5 they'll review it. They'll say no.

6 MR. PETERSON: Justice Breyer, as we  
7 understand what the Fifth Circuit did here, the Fifth  
8 Circuit has already established in its jurisprudence  
9 that equitable tolling is unavailable for statutory  
10 motions.

11 I know Petitioner now takes a different  
12 view. I point you to Petitioner's arguments before the  
13 court of appeals in his reply brief on page 8 where he  
14 asked the court of appeals to reexamine its holding in  
15 Ramos-Bonilla that motions to reopen are not subject to  
16 equitable tolling. So at least before the court of  
17 appeals, Petitioner saw the Fifth Circuit's  
18 jurisprudence the same way that we did.

19 Now, because, in the Fifth Circuit,  
20 equitable tolling of the 90-day deadline is unavailable,  
21 the Board of Immigration Appeals could have granted  
22 relief only by exercising its sua sponte authority to  
23 reopen. That is the only basis on which the Board of  
24 Immigration Appeals could have reopened in this case.  
25 Therefore, the Board of Immigration Appeals' decision

1 whether or not to reopen is a decision that is committed  
2 to agency discretion by law.

3 CHIEF JUSTICE ROBERTS: Well, but normally  
4 it's a -- a circuit precedent establishing a particular  
5 rule on the merits doesn't operate as a bar to  
6 jurisdiction. I mean -- I mean, they may give you a  
7 very short order citing the decision that controls the  
8 precedent in the particular case, but they certainly  
9 have jurisdiction in reviewing.

10 For example, I mean, let's suppose you've  
11 got an argument that you want to overturn the precedent.  
12 They would have had jurisdiction to do that.

13 MR. PETERSON: Mr. Chief Justice, we think  
14 the difference here is that the deadline isn't simply a  
15 question of whether the board was right or wrong in  
16 denying the statutory motion. We see the timeliness as  
17 the key distinction between whether the board's  
18 discretion was unfettered on reopening or fettered on  
19 reopening. And so the first question as we see it --  
20 that is how we distinguish orders denying statutory  
21 motions to reopen from orders denying motions to reopen  
22 sua sponte.

23 And so the first question we would say that  
24 a court of appeals would need to address is whether the  
25 alien's motion to reopen before the Board of Immigration

1 Appeals was timely.

2 If that motion was untimely, then it rested  
3 solely in the board's discretion whether to grant or  
4 deny reopening. And for that reason, under Heckler v.  
5 Chaney, under Brotherhood of Locomotive Engineers, the  
6 Fifth Circuit properly dismissed for lack of  
7 jurisdiction.

8 JUSTICE KAGAN: Do you deny that the  
9 plaintiff here -- that Petitioner thought that he was  
10 asking for equitable tolling? Because I guess -- I  
11 guess this is very similar to the Chief Justice's  
12 question, but it seems to me if somebody comes in and he  
13 says, I'm entitled to equitable tolling, and the court  
14 thinks, no, you're not, equitable tolling is  
15 unavailable. Then what the court should do is something  
16 like this. It should first say, sorry, equitable  
17 tolling is not available.

18 Now, is there a different way we can  
19 construe your petition? Oh, maybe there is. We can  
20 construe it as a sua sponte decision. Now in the end  
21 that's going to lead you to the same results because we  
22 don't have jurisdiction over that, but that that's the  
23 proper order of things. You know, first we'll say, oop,  
24 sorry you lose equitable tolling is unavailable, and  
25 then we'll do whatever construing we can do to see if

1     there are any alternative avenues, and then we decide  
2     there are not.

3             MR. PETERSON:             Well, Justice Kagan we  
4     believe that's what the Fifth Circuit did, albeit  
5     implicitly. I point to page 3 of the Petition Appendix:  
6     We lacked jurisdiction to review the BIA's denial of  
7     Mata's untimely motion to reopen.

8             JUSTICE KAGAN:            No, but there's a -- there  
9     is something, and this is what the Chief Justice was  
10    saying, too. There is something that the court does  
11    have jurisdiction over and it's the question of whether  
12    equitable tolling was available. That's a merits  
13    question, I have jurisdiction over whether equitable  
14    tolling is available. I say it's not or I say it is;  
15    doesn't matter, I have jurisdiction over that question  
16    either way.

17            MR. PETERSON:            The court of appeals  
18    certainly always has jurisdiction to determine whether  
19    it has jurisdiction. So on the way to a jurisdictional  
20    ruling --

21            JUSTICE KAGAN:            It's not determining whether  
22    it has jurisdiction. That -- whether equitable tolling  
23    is available or is unavailable is -- is not itself a  
24    jurisdictional question. That's a merits question.

25            And then when you decide that it's

1     unavailable you can say, okay, is there another way to  
2     construe the thing, and that ends -- that lands you in a  
3     jurisdictional question as to whether you have  
4     jurisdiction over sua sponte decisions.

5             MR. PETERSON:             Justice Kagan, as we've tried  
6     to suggest it, the timeliness is related to the  
7     jurisdiction, because the timeliness of the motion to  
8     reopen tells you whether the board's order denying  
9     reopening is an order that was solely in the board's  
10    discretion or not.

11            JUSTICE GINSBURG:            But it's really -- you're  
12    taking a merits first. You decide the merits and then  
13    we say, then there's no jurisdiction. This is -- this  
14    is what -- whatever the rule is -- as you recognize, is  
15    a claim-processing rule. You -- that rule needs to be  
16    interpreted whether it has any give.

17            But it's -- it's -- there's jurisdiction to  
18    decide that question. I think you agree that there is  
19    jurisdiction in the Fifth Circuit to decide whether or  
20    not this 90-day limit can be equitably tolled.

21            MR. PETERSON:            Your Honor, yes, Justice  
22    Ginsburg, we do agree the Fifth Circuit can decide  
23    that -- has decided it, and as a result of deciding  
24    that, did properly reach the judgement it reached in  
25    this case.

1 JUSTICE KAGAN: But you see there's a little  
2 bit of a problem with the way the Fifth Circuit is going  
3 about this thing, because what the Fifth Circuit has  
4 done is to say that equitable tolling is unavailable and  
5 the only time it ever uttered those words is in an  
6 unpublished opinion. And in all the published opinions  
7 it's just said, you know, we're construing this as  
8 something else and we have no jurisdiction over that.  
9 And what that effectively has done is to insulate from  
10 our review the determination that the Fifth Circuit has  
11 made, if the Fifth Circuit has made it, that equitable  
12 tolling is unavailable.

13 MR. PETERSON: Justice Scalia, when  
14 Ramos-Bonilla adopted the --

15 JUSTICE KAGAN: He's definitely Justice  
16 Scalia.

17 (Laughter.)

18 MR. PETERSON: I'm very sorry --

19 JUSTICE KAGAN: And we're not often  
20 confused.

21 (Laughter.)

22 JUSTICE SCALIA: It's a good question,  
23 though.

24 (Laughter.)

25 MR. PETERSON: Thank you. When the Fifth

1 Circuit in Ramos-Bonilla adopted the second half of --  
2 adopted construal rule from Lin v. Mukasey, we think the  
3 Fifth Circuit necessarily adopted the premise for that  
4 construal rule as well.

5 So when the Fifth Circuit quotes Lin v.  
6 Mukasey for the proposition that an argument seeking  
7 equitable tolling is in essence an argument that the BIA  
8 should have exercised its discretion to reopen sua  
9 sponte, we think that Ramos-Bonilla necessarily adopted  
10 Lin's premise of that, that equitable tolling is not a  
11 basis for filing an untimely or numerically barred  
12 motion.

13 JUSTICE GINSBURG: Wouldn't the --

14 JUSTICE BREYER: But the problem that I  
15 actually have, I guess, at your reaction, is if we don't  
16 follow what I think is the fairly simple thing of the  
17 question presented, you announce two things that I think  
18 there's a huge argument about.

19 One is whether there is court review of the  
20 sua sponte thing because, as you probably know, there  
21 has been a long argument for 40 years about the meaning  
22 of that first part of the APA in Davis; or somebody  
23 says, well, when they say there's no court review when  
24 you commit a matter of discretion to the agency by law,  
25 of course there isn't. They're acting lawfully. But

1 you can still get review of whether they acted as an  
2 abuse of that discretion. Of course. And I think you  
3 can.

4 But I understand there are different points  
5 on that. Do we really want to open up that big  
6 question?

7 And as far as the other question you want us  
8 to open up about whether this is statutorily  
9 forbidden -- you say whether -- whether equitable  
10 tolling is forbidden here, again there are two views.  
11 Lots of the circuits think, no, it isn't, and moreover  
12 the SG thinks that, moreover they're having a rulemaking  
13 on that in a year or so that could encompass that, but  
14 it's secret. But nonetheless -- nonetheless it might.

15 And -- and so we're getting into what's  
16 actually I think a tough question. And maybe it's  
17 cowardly. But I'm thinking why go into those two tough  
18 questions, when in fact we asked for the answer to a  
19 simple question. There are -- you have written a very  
20 good brief and I understand what you're doing and -- but  
21 I still am sort of stuck on this, which I'll put to you.

22 MR. PETERSON: Well, thank you, Justice  
23 Breyer. I know it's the end of the term and I'm asking  
24 you to complicate the case --

25 JUSTICE BREYER: Yes.

1           MR. PETERSON:           But let me point out though  
2   that the Solicitor General might agree that equitable  
3   tolling is available, but agrees with us that every  
4   court of appeals other than the Fifth Circuit to have  
5   addressed the availability of equitable tolling has  
6   gotten its analysis wrong. The Solicitor General agrees  
7   with us that the presumption of equitable tolling is  
8   inapplicable to these sorts of statutes.

9           Every court of appeals to have reached this,  
10   as Petitioner does, reaches the result that equitable  
11   tolling is available through the presumption of  
12   equitable tolling. And now the Solicitor General  
13   suggests that the administrative rulemaking might  
14   provide a solution to this. Well, in at least two  
15   circuits, and likely more, that's been foreclosed. If  
16   you look at the Second Circuit's decision in Iavorski,  
17   the Ninth Circuit's decision in Soca-Gonzalez, both of  
18   them note that Board of Immigrations Appeals' position  
19   is that equitable tolling is unavailable. Both of them  
20   conclude that the statute unambiguously requires  
21   equitable tolling and reject deference to the agency.

22           So to the extent that you have  
23   administrative rulemaking here, as best I can  
24   understand, the Fifth Circuit is the only circuit that  
25   would actually be able to even potentially give effect

1 to it. And --

2 JUSTICE SOTOMAYOR: I'm sorry. I'm totally  
3 confused. I -- I think what the agency is saying, at  
4 least in this situation, is there is no explicit command  
5 in the statute about equitable tolling. There is a time  
6 limit in the statute. But can it be tolled or not?  
7 There's no explicit command in the statute it can't.

8 And so as a matter of procedure, which  
9 generally we give a huge amount of deference to the  
10 agency, it has, albeit in unpublished opinions, followed  
11 a practice of considering it in motions to reopen. And  
12 from that practice, they're telling us, there is,  
13 because the agency has determined that, with respect to  
14 IAC claims, that they will do it.

15 I don't actually see that much problem with  
16 the problem, but I do agree with Justice Breyer that we  
17 don't need to get to that question here, because we  
18 really don't know whether that's the view of the Fifth  
19 Circuit or not. And if they find it or if they say it  
20 doesn't exist, I want to consider their reasons. That's  
21 what we usually do.

22 But they haven't really given us reasons,  
23 other than to say the statute requires it, but I don't  
24 see why.

25 MR. PETERSON: Justice Sotomayor, with

1     respect to the Fifth Circuit, I believe, I would hope,  
2     that we've supplied the reasonings -- reasoning for why  
3     the Fifth Circuit's decision on equitable tolling is  
4     correct.

5             With respect to the agency determinations,  
6     the Board of Immigration Appeals, with rare  
7     exceptions -- and there's no suggestion that this case  
8     is one -- will follow the authority of the circuit in  
9     which it sits. So you can certainly find numerous  
10    unpublished Board of Immigration Appeals decisions  
11    applying equitable tolling to the statutory deadline,  
12    but they do so primarily because they are following the  
13    circuit authority.

14            Now, the government agrees with us that the  
15    Board of Immigration Appeals has not independently  
16    interpreted the statute in a way that would receive  
17    Chevron deference to require equitable tolling. So  
18    right now, I don't believe the board has taken an  
19    official position, except for in the government's brief,  
20    that equitable tolling of the statutory deadline is  
21    available.

22            JUSTICE GINSBURG:           They are saying --

23            JUSTICE SOTOMAYOR:          That's -- that's --

24            JUSTICE GINSBURG:          -- if the Fifth Circuit  
25    was right in saying we -- we -- so -- so we're going to

1 give the Petitioner another chance, we'll consider it  
2 under sua sponte. But the board said twice that its  
3 power to reopen on its own motion is not meant as a cure  
4 for filing defects or otherwise circumvent the  
5 regulation.

6 So I think what they're saying is that if  
7 there's a -- if there's a flaw, if the 90 days -- if the  
8 90 days is -- can't be stretched, then we shouldn't  
9 reach that same conclusion by saying, oh, but we can do  
10 this sua sponte.

11 They -- they seem to be saying their  
12 exercise of the sua sponte authority is controlled by,  
13 do we have a rule that says 90 days and no more? If we  
14 do have such a rule, we shouldn't be exercising our  
15 authority sua sponte to get around that. And that's --  
16 that's in the Petitioner Appendix at both 5 and 9, when  
17 they say we shouldn't use our power to reopen on our own  
18 motion that way, to get around what is the rule.

19 MR. PETERSON: Yes, Justice Ginsburg. We do  
20 think the Board of Immigration Appeals certainly uses  
21 its sua sponte authority to reopen sparingly and  
22 respectfully of the statutory deadlines. As we see  
23 here, the problem is giving effect to a deadline that  
24 Congress set. Congress certainly meant something when  
25 it required these motions to reopen to be filed within

1 90 days.

2 And that means that the board's decision  
3 whether to reopen sua sponte, in order to exist  
4 alongside and not simply swallow that statutory  
5 deadline, needs to be in some way different in kind.  
6 And we think the way that it's different is that when  
7 the board is reopening sua sponte, when it's considering  
8 reopening on its own motion, that's a decision that is  
9 wholly in the board's discretion, and that is  
10 unreviewable in the courts under Heckler v. Chaney.

11 And so when an alien properly invokes the  
12 statutory authority for reopening, the ability to reopen  
13 within the 90 days that we all agree under Kucana is  
14 reviewable, it's, of course, reviewable. When the alien  
15 misses that statutory window, when he asks the board to  
16 reopen after the 90-day period is done, the board's  
17 decision whether or not to grant or to reopen is wholly  
18 in the board's discretion.

19 So when an alien asks the board to reopen --  
20 and I think this case is the best example. When you  
21 look at the request for reopening, you don't see, please  
22 reopen using your statutory authority. You don't see,  
23 please reopen using your sua sponte authority to reopen.  
24 You simply see, Board of Immigration Appeals, please  
25 reopen my case.

1           The way you determine what the true nature  
2   of the board's authority is for the decision that it's  
3   denying is whether that motion was filed within the  
4   statutory time limit or without.

5           So if the court of appeals looks at it and  
6   determines the alien asked for reopening after the end  
7   of the statutory deadline, the answer there is that the  
8   board's decision, its order that says, we deny  
9   reopening, is wholly within the discretion of the board  
10   and is unreviewable under Heckler v. Chaney.

11           JUSTICE SCALIA:           So -- so you -- you say the  
12   Fifth Circuit did not implicitly hold that there was no  
13   review of -- of the statutory deadline period --

14           MR. PETERSON:           As we understand --

15           JUSTICE SCALIA:           -- because you think the  
16   Fifth Circuit read the -- the board's decision, since it  
17   came after the 90 days, to be a sua sponte decision and,  
18   hence, nonreviewable.

19           But that's not consistent with their earlier  
20   decisions, which said, we're going to interpret it this  
21   way because we have no jurisdiction to do it if you  
22   interpret it the other way.

23           I mean, they didn't say that, if it's after  
24   the 90 days, the -- the board should consider it to be  
25   an appeal to its sua sponte authority. They said, since

1 we believe that -- that there is -- that there is no  
2 extension of the 90-day period under the statute, in  
3 order to help the Petitioner, we're going to interpret  
4 it as a request for review of the sua sponte authority.

5 Isn't that -- isn't that what they said.

6 MR. PETERSON: Yes, Your Honor, but we see  
7 the two as essentially indistinguishable. Because the  
8 Petitioner's request came after the expiration of the  
9 90-day period, it could have been granted only through  
10 the board's exercise of its sua sponte authority. And a  
11 decision whether to grant or deny the board's exercise  
12 of its sua sponte, in our view, is unreviewable.

13 Let me point out one possible concern in  
14 writing an opinion here. And that's the habeas context.  
15 As the Court's aware, prisoners can be quite creative in  
16 attempting to circumvent the bar on second or successive  
17 petitions under 2254 and 2255 and will frequently file  
18 motions captioned under 2241 or possibly obscure common  
19 law writs, seeking relief that's properly available  
20 under 2254 or 2255.

21 In those circumstances, the district courts  
22 will properly look at the merits of petitioner's  
23 request, determine that it is a request that could truly  
24 be granted only under 2254, 2255, and whatever the  
25 caption the prisoner has placed on it will enforce

1 AEDPA's jurisdictional bar.

2 And finally, with respect to merits of  
3 equitable tolling, we would simply note that, in our  
4 view, Justice Ginsburg, I believe the Fifth Circuit has  
5 already determined that Petitioner's motion to reopen  
6 was untimely. And in the event that the Court remands  
7 to the Fifth Circuit without addressing anything other  
8 than the jurisdictional question, the inevitable result  
9 in the Fifth Circuit would simply be to deny on the  
10 merits, which is a result that would not lead to any  
11 greater benefit for Petitioner.

12 If there are no further questions.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 Mr. Fleming, you have four minutes  
15 remaining.

16 REBUTTAL ARGUMENT OF MARK C. FLEMING

17 ON BEHALF OF THE PETITIONER

18 MR. FLEMING: Thank you, Mr. Chief Justice.

19 I -- I would simply clarify the -- the issue  
20 raised, I think, first by Justice Kagan, but then by  
21 others, as to whether there was any confusion in either  
22 the board or the Fifth Circuit as to what relief my  
23 client was seeking.

24 In the board decision, on page 7 of the  
25 Petition Appendix, the board makes clear that it

1 understands that Mr. Mata was seeking tolling. It says,  
2 in bringing this untimely motion to reopen, the  
3 Respondent claims ineffective assistance of counsel, and  
4 then a description of matter of Lozada. And then the  
5 board says, and the time for filing a motion to reopen  
6 may be tolled. In cases of ineffective --  
7 ineffectiveness of counsel, the alien must show that he  
8 was prejudiced by counsel's performance. And then the  
9 analysis of this particular case continues.

10 And in the Fifth Circuit, the panel opinion  
11 says, when it is summarizing the decision or the  
12 proceedings below -- and this is on page 2 of the  
13 Petition Appendix -- Mata subsequently filed an untimely  
14 motion to reopen his removal proceedings based on a  
15 claim of ineffective assistance of counsel and asking  
16 the BIA to equitably toll the applicable finding --  
17 filing period, or exercise its authority to reopen his  
18 proceedings sua sponte.

19 The Fifth Circuit knew exactly what was  
20 going on. There was a request for statutory tolling or  
21 sua sponte reopening.

22 So I don't mean to be ungenerous to the  
23 circuit at all. I think they got this exactly right.  
24 They understood the nature of the relief requested.  
25 Where they went wrong is they believed they lacked

1 jurisdiction over the first request, and that everything  
2 had to fall into the second request, where they believe  
3 they also lacked jurisdiction. And so they dismissed  
4 the entire petition. That error --

5 JUSTICE GINSBURG: Do you --

6 MR. FLEMING: -- is the one that should  
7 be --

8 JUSTICE GINSBURG: -- do you disagree with  
9 Mr. Peterson that if we were simply to say, Fifth  
10 Circuit, you have jurisdiction to decide this issue of  
11 equitable tolling, that then the -- from what they've  
12 done so far, the likelihood is they'll say, fine, we  
13 have jurisdiction, there is no equitable tolling?

14 MR. FLEMING: I do disagree because I don't  
15 think that's a foregone conclusion. I think there is  
16 every likelihood that the Fifth Circuit, once freed from  
17 its erroneous view that it is bound by panel precedent  
18 or by some other principle to not exercise appellate  
19 jurisdiction, will then look at the reasoning that other  
20 courts of appeals, every other court of appeals to have  
21 addressed this, have applied, and conclude that there  
22 is, in fact, equitable tolling.

23 Will they review Mr. Mata's appeal on the  
24 merits and necessarily rule in his favor? I think they  
25 should and those are the arguments we will press on the

1 merits.

2 But I don't think that it's our burden to  
3 show ultimate victory on every issue in order to show  
4 that the Fifth Circuit misconstrued its jurisdiction.

5 JUSTICE GINSBURG: What -- what of the  
6 argument that -- that the presumption of equitable  
7 tolling applies to statutes of limitations, but not for  
8 procedural time limits like this?

9 MR. FLEMING: Our -- our position, Justice  
10 Ginsburg, as laid out in our reply brief, is that this  
11 is a statute of limitations. It serves the policies  
12 that this Court recognized in Young that are advanced by  
13 a statute of limitations, namely, the advancing of  
14 repose. It will ensure in most cases that after 90  
15 days, the BIA's order of removal will be final, and it  
16 does also encourage the bringing of timely -- a prompt  
17 motion to reopen claims, so that they are not lagging on  
18 for a long time. And that was Congress's intent.

19 None of that is inconsistent with tolling.  
20 This Court has said repeatedly in cases like Bowen and  
21 Holland that when you have a situation like extreme  
22 misconduct by counsel, where there is a -- an  
23 extraordinary hurdle that diligence will not get you  
24 over, it is consistent with the principle of -- of  
25 statute of limitations to allow tolling to proceed. And

1 we submit that this is not a situation where the  
2 presumption is actually rebutted or does not apply.

3 I'd say a word about the agency context  
4 because it is something that has been brought up on both  
5 sides -- I apologize. I will not say that.

6 We would respectfully submit that the  
7 judgment should be reversed and the case remanded.

8 CHIEF JUSTICE ROBERTS: Thank you.  
9 Mr. Peterson, this Court appointed you to brief and  
10 argue this case as an amicus curiae in support of the  
11 judgment below. You have ably discharged that  
12 responsibility, for which we are grateful.

13 The case is submitted.

14 (Whereupon, at 12:12 p.m., the case in the  
15 above-entitled matter was submitted.)  
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